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DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

September 2, 1998

MEMORANDUM FOR NATIONAL TAXPAYER ADVOCATE

ACTING EXECUTIVE OFFICER FOR SERVICE CENTER
OPERATIONS

FROM:

Marlene Gross
Deputy Chief Counsel CC

SUBJECT:

Application of Section 7502 to Refunds Claimed on Original
Delinquent Returns

This memorandum is intended to advise you of circumstances in which it appears that confusion about the proper interpretation of Code section 7502 may be causing the Service to issue income tax refunds that are barred by the statute of limitations.

General Fact Pattern. The issue in question arises when a taxpayer does not file a tax return when it is due, but instead mails a delinquent original return (claiming a refund) more than two years after the original due date. Typically, the delinquent return is mailed to the Service Center just prior to three years after the original due date and arrives at the Service Center soon after that three year point. For example, a taxpayer's return for 1994 was due on April 15, 1995, but the taxpayer did not file it then. Instead, on April 15, 1998, the taxpayer mails the 1994 return to the Service in order to claim a refund of taxes that were withheld from wages. The return is received by the Service Center on April 17, 1998.

Summary of Legal Analysis. In these circumstances the statute of limitations on claiming the refund is set forth in Code section 6511(a), and is three years from the time the return was filed or two years from the time the tax was paid, whichever is later. In addition, under section 6511(b), the amount that can be refunded is limited to amounts paid by the taxpayer within the three years preceding the filing of the claim if the taxpayer has filed a return, or within the two years preceding the filing of the claim if the taxpayer has not filed a return. Finally, it is important to understand that withheld taxes are deemed paid on the due date of the return; in the example described above, the taxes were deemed paid on April 15, 1995.

The confusion apparently arises only because taxpayers or Service employees may incorrectly look to the "timely mailing treated as timely filing" rule of section 7502 (rather than the basic rule of section 6511) to determine whether the refund claim is

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timely. In general, section 7502 would treat a return or refund claim as timely filed, if it was postmarked before its correct due date but was received by the Service after the due date.

However, section 7502 applies only where use of the postmark date would make an otherwise late return or claim timely. In the facts described above, section 7502 cannot be applied to establish the postmark as the return filing date for the delinquent return because the return was not postmarked on or before the prescribed due date for its filing (including any extensions). The return filing date for the delinquent original return is therefore the date of its actual receipt by the Service.

Once it is understood that section 7502 does not apply to treat the postmark as the date the return is filed, the taxpayer cannot rely on the application of section 7502 to the refund claim. Even if section 7502 could be applied to treat the refund claim as filed on the postmark date, the limitations of section 6511(b)(2) would preclude a refund in the factual circumstances described above. Under section 6511(b)(2), the most that could be refunded would be amounts paid by the taxpayers within the two years preceding the date the claim was deemed filed (i.e., amounts paid on or after April 15, 1996) or three years before the return was actually filed (i.e., amounts paid on or after April 17, 1995). Since the taxes withheld from wages were deemed paid April 15, 1995, they cannot be refunded. See Christie v. United States, No. 3-90-285 (W.D. Wash. 1990), aff'd, No. 91-2375 MN (8th Cir. 1992).

Immediate Action Recommended. I recognize that the statute of limitations rules are quite complex and can be very confusing both for taxpayers and our own employees. Indeed, as you are aware, two of our District Counsel offices misinterpreted these same rules prior to consulting with the National Office. Although we have communicated the corrected analysis set forth above, I have been advised that refunds are still being issued by at least one Service Center (Fresno), supposedly in reliance on a National Taxpayer Advocate memorandum dated August 12, 1998, in the case of a particular taxpayer.

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If you have any questions about this memorandum, please call me at 822-3310 or the Deputy Associate Chief Counsel (Domestic Field Service) at 822-4510.